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In The
Supreme Court of the United States

OFFICE OF THE CLERK

FRANKLIN JAY SCOTT, JR., A MINOR;
NICHOLAS THOMAS, A MINOR,

Petitioners,

v.

SCHOOL BOARD OF ALACHUA COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a public high school ban the non-disruptive display of the Confederate Battle flag?

PARTIES TO THE PROCEEDING

Petitioners are Franklin J. Scott, Jr. and Nicholas Thomas. Petitioners were plaintiffs in the United States District Court for the Northern District of Florida and Appellants before the United States Court of Appeals for the Eleventh Circuit.

Respondent is the School Board of Alachua County, a public school board organized under the Constitution of State of Florida. Respondents were defendants and appellees below.

CORPORATE DISCLOSURE

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals in *Franklin J. Scott, Jr. and Nicholas Thomas, The School Board of Alachua County*,324 F.3d 1246 (11th Cir. 2003).

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals is reported at *Scott v. School Board of Alachua County* 324 F.3d 1246 (11th Cir. 2003) and set out hereinafter as Appendix A. The district court's unpublished summary judgment Memorandum and Order is set out hereinafter as Appendix B. *See Scott v. School Board of Alachua County,* No. 1:01cv29 MMP (Aug. 7, 2002).

STATEMENT OF JURISDICTION

The judgment of Eleventh Circuit Court of Appeals was entered on March 20, 2003. This Petition for Writ of Certiorari is filed with ninety (90) days of the filing of that judgment.

Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331, the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. The First Amendment states, in pertinent part:

> Congress shall make no law .... abridging the freedom of speech, or the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment states, in pertinent and part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners instituted this civil rights action pursuant to 42 U.S.C. § 1983 which states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State... subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

As the district court decided this case on a motion for summary judgment, the facts are derived from the record below and construed in a light most favorable to the Petitioners.

In 1995, when Dr. Lamar Simmons assumed the position of principal of Santa Fe High School in Alachua, Florida, he established a ban on the display of Confederate Battle flags and similar symbols on school grounds. This unwritten ban on Confederate flag symbols was not based upon any specific incident nor any general sense of racial tension at the school, let alone any actual disruption attributable to the display of Confederate Battle flag. Rather, Principal Simmons' ban was based on his belief that it might avoid potential problems in the future.

Since 1995, the unwritten ban on the display of Confederate Battle flags at Santa Fe High School has remained in full force and effect. The ban is consistently and routinely enforced by Santa Fe High

School administrators and discipline is meted out to students who refuse to obey. The Alachua County School Board is fully aware of the ban on the display of Confederate Battle flags and symbols at Santa Fe High School and has expressly ratified the policy. The ban remains in full force and effect today.

During the 2000-2001 academic school year, Petitioners, Franklin J. Scott, Jr. ("Scott") and Nicholas Thomas ("Thomas") were juniors attending Santa Fe High School. Both Scott and Thomas have ancestors who fought for the Confederacy during the Civil War. For this and other reasons, both Scott and Thomas are proud of their Southern Heritage.

On the morning of October 24, 2000, Scott drove his vehicle into the Santa Fe High School student parking lot with a Confederate Battle flag flying from his antenna. Upon parking, he furled the Confederate Battle flag and covered it with a PVC tube. Shortly thereafter, Santa Fe School administrators suspended him for two (2) days for "displaying a Confederate Battle flag on his truck as he was entering campus." Additionally, the Alachua County School Board ("the School Board") revoked his zoning exception requiring him to transfer to Bucholtz High School in Gainesville, Florida for the remainder of the school year

On October 4, 2000, Thomas wore to school a T-Shirt entitled "Legends of Gray" which had a small logo on the front left breast depicting a Confederate Battle flag with the phrase "Legends in Gray" superimposed. On the back of his T-Shirt was an artistic rendering of a company of Confederate Civil

War soldiers marching in a field carrying the First National flag of the Confederacy and Confederate Battle flag. School administrators ordered him to remove the T-Shirt and issued a discipline warning for "dress code violation-Confederate Flag." Subsequently, Thomas again wore the T-Shirt on October 19, 2000. However, on that day, he was not scheduled to attend classes at Santa Fe High School. Rather, he was at school solely to meet another student to travel to a school-approved agricultural conference in Georgia. Notwithstanding, school administrators observed his Legends in Gray T-Shirt and issued a one-day in-school suspension for "dress code violation-Confederate Flag on T-Shirt."

In neither case did Scott's or Thomas' display of the Confederate Battle flag disrupt school activities nor threaten to incite or inflame violent conduct. Rather, Scott and Thomas were disciplined solely because of their violation of the school's unwritten ban.

Since the institution of the ban on the display of Confederate Battle flags at Santa Fe High School in 1995, there have been no documented instances of disruption precipitated or inflamed by the display of the Confederate Battle flag. Indeed, the only documented instance of racial tension at Santa Fe High School during the relevant period concerned a fight between two students over a seat on a bus. This altercation did not involve a display of a Confederate Battle flag and occurred in the 1998-1999 academic school year - a full two years before discipline meted out to Scott and Thomas in the instant case.

Petitioners instituted this civil rights case under 42 U.S.C. § 1983 when the School Board refused to expunge the suspensions from their records and reaffirmed the continuing ban on the display of Confederate Battle flags at Santa Fe High School. Petitioners claimed deprivation of their constitutional civil rights as secured by the First Amendment. The district court granted the School Board's motion for summary judgment, concluding that there was no constitutional violation. *Scott,* Appendix B. On appeal, the Eleventh Circuit affirmed the lower court's granted summary judgment, also finding no constitutional violation. *Scott,* 324 F.3d 1246 (11th Cir. 2003); Appendix A.

REASONS FOR GRANTING THE WRIT

I.

A conflict has developed among the circuits as to whether a public high school student possesses the constitutional right under the First Amendment to the non-disruptive display of Confederate Battle flag symbol. In the case below, the Eleventh Circuit held that "Principal Simmons' unwritten ban of Confederate flag on school grounds was not an unconstitutional restriction of the plaintiff's First Amendment rights. As such, there is no actionable § 1983 claim in this case." *Scott,* 324 F.3d at 1247, A-2. Further, the appellate court stated:

> Although public school students' First Amendment rights are not forfeited at the school door, those rights should not

> interfere with the school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve. Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school.

Id. at A-3.

By so holding, the Eleventh Circuit has established a rule that public high school students do not enjoy a constitutional right to the non-disruptive display of Confederate Battle flags under the First Amendment. This holding is in conflict with numerous other Courts of Appeal which have recognized a public high school student's constitutional right to display a Confederate Battle flag subject to the principles of non-disruption enunciated by this Court in *Tinker v. Des Moines Independent County. School Dist.*, 393 U.S. 503 (1969). *E.g., Castorina v. Madison County School Board,* 246 F.3d 536 (6th Cir.2001); *Augustus v. The School Board of Escambia County,* 507 F.2d 152 (5th Cir. 1975); *Smith v. St. Tammany School Board,* 316 F. Supp 1174, 1175 (E.D.La. 1970), *aff'd* 448 F.2d 414 (5th Cir. 1971) (*per curiam); see also Sypiniewski Warren Hills Regional Board of Education,* 307 F.3d 243, 254 (3rd Cir. 2002), *cert. denied* 123 S.Ct. 2077 (2003) (in *dicta,* the Court acknowledged students'

constitutional right to the display of the Confederated Battle flags, but, due to the substantial and concrete evidence of disruptions related to the Confederate Battle flag, suggested such a ban was appropriate under *Tinker); West v. Darby Unified School District No.* 260, 206 F.3d 1358 (10th Cir. 2000), *cert. denied* 531 U.S. 825 (2000)(recognizing the constitutional right to display Confederate Battle flag at a public high school, but upholding a ban due to substantial and concrete evidence of prior disruption related to the Confederate Battle flag); *Melton v. Young*, 328 F. Supp. 88 (E.D. Tenn. 1971), *aff'd*, 465 F.2d 1332 (6th Cir. 1972) (semble); *Phillips v. Anderson County School District 5*, 987 F. Supp. 488 (D.S.C. 1997)(semble).

In *Castorina v. Madison County School Board* 246 F.3d 536 (6th Cir. 2001), the Sixth Circuit reversed a lower court's grant of summary judgment to a school board that had suspended a public high school student for wearing a Hank Williams, Jr. T-Shirt that prominently displayed two Confederate Flags and the phrase "Southern Thunder." In reaching this conclusion, the Sixth Circuit acknowledged the public high school students' constitutional right under the First Amendment to symbolic expression involving a T-Shirt depicting Confederate flags. Further, the *Castorina* court reversed the lower court's summary judgment for the school board because the ban on Confederate Battle flag was instituted "without any showing of disruption." *Id.* at 542.

Accordingly, the Sixth Circuit's recent holding in *Castorina* is in direct and irreconcilable conflict with the Eleventh Circuit's holding in the case at bar.

Absent a Writ of Certiorari issuing to resolve this conflict, an anomalous result will ensue whereby the constitutional rights of public high school students under the First Amendment are dependent upon the location of the public school that they attend. Public high school students in Ohio, Colorado and New Jersey would possess the constitutional right to the non-disruptive display of Confederate Battle flags at school, whereas a student in Alabama would have no constitutional right to challenge an unsubstantiated ban on the display of Confederate Battle flags. Indeed, absent the grant of certiorari, a curiously ironic result will arise: a student living in States that remained with the Union during the Civil War would have the constitutional right to the non-disruptive display of Confederate flags at school while students residing in states that seceded from the Union [where students' ancestors are much more likely to have fought on the side of the Confederacy] would be denied the constitutional right to the non-disruptive display of a Southern Heritage symbol such as the Confederate Battle flag.

REVIEW WILL AFFORD CLARITY AS TO THE SCOPE AND STANDARD OF RESTRICTIONS ON PUBLIC STUDENTS' FIRST AMENDMENT RIGHTS OF EXPRESSION

II.

It has almost been a quarter of a century since this Court recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker*

v. Des Moines Community School Dist, 393 U.S. 503, 506 (1969):

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which State must respect, just as they themselves must respect their obligations to State. In our system students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Id at 511.

In the years since *Tinker*, this Court has addressed the First Amendment rights of public school students on two other occasions. First, in *Bethel School Dist., No. 403 v. Fraser*, 478 U.S. 675 (1986). Second, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Fraser* upheld a school's decision to discipline a student after he used "offensively lewd and indecent speech" during a speech nominating a classmate for a position in student government. In *Hazelwood*, this Court upheld the school's decision to censor certain articles in a school newspaper. While many courts have recognized that *Fraser* and *Hazelwood* involve the right of a school to control speech in fora that bear the

imprimatur of school sponsorship (i.e., a school assembly and a school newspaper), other courts have questioned the continued validity of *Tinker* in light of *Fraser* and *Hazelwood*. *See Scott*, 324 F.3d at 1248, A-4; B-5; *West v. Darby Unified School District No. 260*, 23 F.2d 1223, 1233-34 (D. 1998), *aff'd, on other grounds* 206 F.3d 1358 (10th Cir.), *cert. denied* 531 U.S. 825 (2000). Nowhere has this struggle to juxtapose *Fraser* and *Hazelwood* with *Tinker* been more confused than in the Eleventh Circuit.

In *Denno v. School Board of Alachua County*, 182 F.3rd 780 (11th Cir. 1999), *vacated* 193 F.3d 1178, *rev'd in part on rehearing*, 218 F.3d 1267 (11th Cir.), *cert. denied*, 531 U.S. 958 (2000), the Eleventh Circuit reviewed the grant of qualified immunity to school officials who suspended, attempted to expel, and filed criminal charges against a public high school student for displaying a four inch by four inch Confederate Battle flag during the school lunch period. Initially, the Eleventh Circuit reversed the lower court's grant of qualified immunity finding that the student had a "clearly established constitutional right" to the non-disruptive display of the Confederate Battle flag under *Tinker*. *Denno*, 182 F.3d 780 (11th Cir. 1999). However, on *sua sponte* panel rehearing, the Eleventh Circuit changed course and affirmed the grant of qualified immunity finding that *Fraser* and *Hazelwood* as well as other subsequent non-binding precedents had sufficiently muddied the legal landscape so as to render the constitutional right of a public student's non-disruptive display of Confederate Battle flag to become "unclear." *Denno*, 218 F.3d 1267, 1274 (11th Cir.

2000). Interestingly, the *Denno* court declined to clarify the legal landscape in this regard. *Id.* at 1274 n. 5.

The shadow of uncertainty cast by the Eleventh Circuit's opinion *Denno* has introduced the belief in the Eleventh Circuit that a ban on non-disruptive symbolic expression may be upheld not under the *Tinker*, but alternatively under a "so called" *Fraser* standard. No where is this belief more evident in the district court's ruling in the instant case.

As an alternative basis to granting summary judgment to the School Board, the district court stated:

> Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government." To do so, they must have the flexibility to control the tenure and contours of student speech within the school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption.

Scott, 324 F.3d at 1248, A-4; B-5. Thus, the district court reasoned that because the Confederate Battle flag evokes different and highly charged emotions, the School Board had the right and duty to "contour the range of expression" of students on such volatile issues so as to avoid "hurt feelings" and "emotional trauma." *Scott*, 324 F.3d at 1249, A-6—A-7; B-8.

Granting review in the instant case will bring clarity to this muddied legal landscape. Review will guide the lower courts as well as public school administrators throughout the country in knowing whether non-disruptive symbolic expression by students can be lawfully prohibited under *Tinker* only with substantiated and concrete evidence of disruption or whether such speech can be banned under *Fraser* without any demonstrated evidence of disruption, solely to "inculcate the habits and manners of civility" in their students.

Should this Court grant certiorari and reaffirm the standard enunciated in *Tinker*, review will also have the salutary benefit of providing guidance as to the level of specificity and concreteness required to satisfy a prohibition of expression under *Tinker*. On the one hand, some courts have held that such a showing must be specific, concrete and demonstrable, and **not** some remote apprehension of a disturbance. *See Saxe the State College Area School District*, 240 F.3d 200, 212 (3rd Cir. 2001); *Chalifoux v. New Caney Independent School District*, 976 F. Supp 659, 667 (S.D. Tex.1997); *Clark v. Dallas Independent School District* 806 F. Supp. 116, 120 (N.D. Tex. 1992). On the other hand, courts such as the district court below have found a ban is justified by any evidence of racial conflict, no matter how remote in time and unrelated to the symbolic display of the Confederated Battle flag in question.

CONCLUSION

There is no question that the symbolic display of the Confederate Battle flag can evoke strong and differing emotions: those of heritage and pride as well as those anger and humiliation. Yet, symbolic expressions, even those of hate, *see Virginia v. Black*, __ U.S. __, 123 S. Ct. 1536 (2003), are entitled to protection under the First Amendment:

> And it is as a free speech case, not as a Confederate flag case, that this [Petition] must be resolved.
>
> * * *
>
> [T]he First Amendment was not written for the vast majority of [Americans]. It belongs to a single minority of one. It is easy enough for us as judges to uphold expression with which we personally agree or speech we know will meet with general approbation. Yet pleasing speech is not the kind that needs protection.
>
> Our Constitution safeguards contrarian speech for several reasons. As the Civil Rights Movement demonstrates, yesterday's protest can become tomorrow's law and wisdom. Other contrarian speech should move popular majorities to reaffirm their own beliefs rather than suppress those of others. The reminders of history's most tragic errors

> only deepen our commitment to the dignity of all citizens: The Constitution that houses the First Amendment also shelters the Fourteenth, an everlasting reminder that a nation betroth to liberty and equal justice under law must remain vigilant to realize both.

Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing *en banc*).

The issues presented in this Petition are of great Constitutional import warranting the issuance of a writ of certiorari.

Respectfully Submitted,

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